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Judicial Review of Church Expulsion

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JUDICIAL REVIEW OF CHURCH EXPULSION

I now write that you must have nothing to do with any so-called Christian who leads a loose life, or is grasping, or idolatrous, a slanderer, a drunkard, or a swindler. You should not even eat with any such person. What business of mine is it to judge outsiders? God is their judge. You are judges within the fellowship. Root out the evil-doer from your community. I Cor. 5: 11-13

Churches often expel their brethren for one reason or another, but not always fairly.[1] And in many of these instances the excommunicated member does not let the association's action remain unchallenged. Banishment is often part of a larger intrachurch dispute intensified by unusual bitterness, surpassing similar familial wrangles in their vehemence and affording a glimpse of the larger religious wars of the past.[2] Because of the incongruity of these battles, courts, when called upon to settle them, are generally reluctant to step in and often flavor their opinions with lamentations that the suit has its origin in a church.[3] But they are repeatedly asked to intercede, and the volume of cases alone indicates the necessity of establishing a rule of law that maintains a proper relation between church and state while balancing the interests of the exiled member in seeking relief and the church in retaining maximum freedom of action.

Courts disagree on what action they may or should take when a former member, expelled in violation of the church's rules and practices, asks to be reinstated. Most jurisdictions have refused relief, labeling the plaintiff's troubles *damne absque injuria*, but, as is true of the courts that grant redress, their decisions have usually been reached with a rather perfunctory analysis. While

1. A somewhat extreme example is David v. Carter, 222 S.W.2d 900 (Tex. Civ. App. 1949) which involved a Baptist minister whose adulterous affairs and arbitrary conduct no doubt violated his church's precepts. The plaintiffs were summarily expelled at the pastor's instigation at a meeting conducted by him with the aid of threats and a rifle.

2. In Clapp v. Krug, 232 Ky. 303, 22 S.W.2d 1025, 1029 (1929), the heat of the battle prompted this comment: "In this instance it appears to an unbiased mind that the differences which have arisen and the bitterness that has been engendered have assumed a magnitude out of all proportion to the initiatory causes, and the possibilities of spiritual disaster and destructive effect are so grave as to call for the exercise of the Christian graces of reconciliation, forbearance, brotherly love, and unity, according to the admonition given by the Apostle Paul to the Church at Corinth."

3. See, *e.g.*, Stansberry v. McCarthy, 238 Ind. 338, 149 N.E.2d 683 (1958); Ragsdale v. Church of Christ in Eldora, 244 Iowa 474, 55 N.W.2d 539 (1953). The statement in Munsel v. Boyd, 30 Ohio Cir. 182, 190 (1907) is typical: "This case has been a most unfortunate controversy and it has developed into one of those bitter feuds that we sometimes discover in bodies which should especially exemplify to the world that living Christian spirit which was inculcated by the Master. It is a kind of case which the courts dislike to approach. . . ."

some courts make no distinction between religious organizations and other voluntary associations,[4] most agree that churches stand on a "higher plane,"[5] and must be allowed a freer hand in their internal affairs. Aside from this comment and a usually bland affirmation of freedom of religion,[6] there is little helpful analysis of the problem, and almost no consideration is given to many important factors, such as the effect judicial supervision will have on the church and what it can reasonably be expected to accomplish. Orthodox methods of determining these cases are attacked occasionally by the courts, but not always satisfactorily.[7] Few commentators have been attracted by the subject, but those that have considered the matter have been fairly consistent in their dissatisfaction with the traditional approaches.[8]

THE TRADITIONAL VIEW

The majority of courts deny relief to an excommunicated church member who alleges that he has been expelled in violation of the organization's rules, practices, and customs,[9] and direct him back to the church for relief.[10] The most common ground for these decisions is that because of our traditional notions of freedom of religion and separation of church and state, the courts will not decide ecclesiastical questions such as those relating to discipline.[11] *Shannon v. Frost*[12] is the earliest and perhaps the foremost authority for this rule. The policy of abstention from interference with ecclesiastical affairs generally was firmly established by the United States Supreme Court in *Watson v. Jones*,[13] which relied in part on *Shannon*. While the prohibition against judicial interference enunciated in *Watson* is not a constitutional requirement,[14] most that what is being dealt with in church disputes is largely a per-

4. See Powanda v. Pido, 304 Pa. 42, 155 Atl. 90 (1931).
5. Nance v. Busby, 91 Tenn. 303, 18 S.W. 874, 879 (1892).
6. See, *e.g.*, Brown v. Mount Olive Baptist Church, 124 N.W.2d 445 (Iowa 1963); State *ex rel.* Soares v. Hebrew Congregation "Dispersed of Judah," 31 La. Ann. 205 (1879).
7. See Randolph v. First Baptist Church, 53 Ohio Op. 288, 120 N.E.2d 485 (1954).
8. ZOLLMANN, AMERICAN CHURCH LAW, §§ 325-327 (1933); Chaffee, *The Internal Affairs of Associations Not For Profit*, 43 HARV. L. REV. 993 (1930). Zollmann declares that, "No one, lawyer or layman, can emerge from an attentive reading of the cases on this subject but with a mind scratched and bleading and utterly bewildered by the judicial vagaries encountered." (§ 326). He concludes that because membership is a contract right, courts should review church decisions to determine whether it followed its own rules. (§ 328-40).
9. *E.g.*, Mount Olive Primitive Baptist Church v. Patrick, 252 Ala. 672, 42 So. 2d 617 (1949); Stewart v. Jarriel, 206 Ga. 855, 59 S.E.2d 368 (1950); Kompier v. Thegza, 213 Ind. 542, 13 N.E.2d 229 (1938).
10. Thomas v. Lewis, 224 Ky. 307, 6 S.W.2d 255 (1928).
11. Hundley v. Collins, 131 Ala. 234, 32 So. 575 (1902); Brown v. Mount Olive Baptist Church, *supra* note 6.
12. 42 Ky. (3 B. Mon.) 253 (1842).
13. 80 U.S. (13 Wall.) 679, 728 (1871); "The right to organize voluntary religious associations to assist in the expression and dissemination of [729] any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed."
14. The basis of jurisdiction of the matter was diversity. It involved a dispute in a Presbyterian church in Kentucky over the church's stand regarding questions relating to

sonal matter—the loss of fellowship and spiritual damage to the courts have accepted it as an abstract proposition, even though it is not always applied in the discipline cases as a ground for denying review.

Aside from this reason, several other bases for refusing judicial relief have been advanced. For example, it has been stated that the breach will only be widened if the member is allowed to bring the suit for reinstatement.[15] This contention seems to recognize that what is being dealt with in church disputes is largely a personal matter—the loss of fellowship and spiritual damage to the plaintiff. The loss of some remote right in the church property or infringement of a nebulous contract can scarcely be the motivation for most of these suits. Therefore, it is important for the court to try to decide whether the dispute could be settled satisfactorily to the plaintiff or to the church as a whole if the desired relief were rendered. On one hand, if the association would not admit that its action was hasty and unjust, passion might be steeped and the banished member may find the relationship so unsatisfactory that he would voluntarily quit the organization later. Even if the church has only made a good faith mistake as to its procedure, similar repercussions may result. Thus, the court in both instances may find that its intervention has not only failed to be effective but has compounded the member's troubles by making a voluntary reconciliation unlikely. On the other hand, the dignity of a court's judgment may cause a reconsideration and admission that the dismissal proceedings were neither politic nor wise, and if the member is afforded a hearing, he may be able to convince the church that it should not displace him.

It has been pointed out that determinations of what procedures must be followed by the church when expelling a member should be left conclusively to church tribunals because they are better able to discern them.[16] Thus, if the rule is adopted that the church must follow its own procedures in excommunicating a member, the court may find itself making law for the association in cases where the practices and customs are difficult to ascertain;[17] a gen-

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the Civil War, and the majority had been declared entitled to the property by the General Assembly of the Presbyterian Church in the United States. The Supreme Court affirmed the Circuit Court, holding that all civil courts were precluded by the Assembly's determination. See Comment, 43 CALIF. L. REV. 322 (1955) for a discussion of this question.

15. Jenkins v. New Shiloh Baptist Church, 189 Md. 512, 56 A.2d 788 (1948).

16. State *ex rel.* Hatfield v. Cummins, 171 Ind. 112, 85 N.E. 359 (1908); Hendryx v. People's United Church, 42 Wash. 336, 84 Pac. 1123 (1960); *accord*, Watson v. Jones, *supra* note 13, reasoning that the appeal would be from a learned tribunal to one which is less so.

17. Roscoe Pound aptly points out the inherent difficulties in construing church law in Bonacum v. Harrington, 65 Neb. 831, 91 N.W. 886, 887 (1902): "In order to reach a sound construction on controverted points, the court should be able to enter into and give effect to the reason and intention of the lawgivers. It must know the general spirit of the organization, and its attitude towards its governing authorities,—whether it construes the laws relating to their powers liberally or strictly; and it must consider the construction, if any, which usage and common consent has determined. . . . In such a case as this there would be great danger that the ideas of the court would run counter to those of the fathers of the church, [888] and make laws by construction which were never intentionally adopted." Comment, 13 CORNELL L. Q. 464 (1928).

erally unacceptable result.[18] This probably would occur most often in cases involving the churches having a congregational rather than a presbyterian or hierarchical form of government[19] since the former are likely to be more loosely organized and are less likely to have readily accessible and clear formulations of excommunication procedure.[20] This, and the fact that most of these cases arise in the independent churches, adds significance to this conclusion.

A few decisions are based on the theory that the member agreed, by contract, to be subject to the association's disciplinary procedure when he entered the fold and therefore cannot object to its exercise, even if the church tribunal acts arbitrarily.[21] This approach has been severely criticized for its artificiality.[22] Finally, the reluctance to act in these cases seems to stem in part from the common law rule that equity acts only to protect property rights, and will not enforce rights of personality.[23] The trend today, however, is away from this rigid proposition[24] so it is no longer a valid reason for denying relief.

The rule that courts will not review expulsion from religious societies is subject to the qualification that relief will be granted if a civil or property right is involved.[25] (In this context, the terms civil and property are used in opposition to spiritual or ecclesiastical rights.[26]) Although it is not clear what the rule encompasses, it is generally accepted that membership itself is not such an interest as will be protected.[27] There are some exceptions, however, and notable among these is *Randolph v. First Baptist Church*[28]

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18. *But see* Rock Dell Norwegian Evangelical Lutheran Congregation v. Mommsen, 174 Minn. 207, 219 N.W. 88 (1928), wherein the court held membership is a property right and notice and hearing must be afforded even if not provided for by the church's rules and practices.

19. The totality of denominations have been categorized into three basic groups in reference to their form of government: (1) in the heirarchical or prelatical form, the governing power is in the higher clergy, to which form is assigned, among others, the Roman Catholic Church. (2) The power in the presbyterian form resides in assemblies, synods, presbyteries and sessions. The Lutheran and Presbyterian polities are examples of this type. (3) In the congregational or independent form, the congregation is supreme, and assigned to this group are the Baptist and Congregational churches, among others. Thomas v. Lewis, *supra* note 10; 7 BAYLOR L. REV. 425 (1955).

20. See Mount Olive Primitive Baptist Church v. Patrick, *supra* note 9; Evans v. Criss, 39 Misc. 314, 240 N.Y.S.2d 517 (Sup. Ct. 1963). Both of these cases involved conflicting interpretations of Baptist expulsion procedure.

21. Partin v. Tucker, 126 Fla. 817, 172 So. 89 (1937); Kompier v. Thegza, 213 Ind. 542, 13 N.E.2d 229 (1938).

22. Chaffee, *supra* note 8.

23. See Stewart v. Jarriel, 206 Ga. 855, 59 S.E.2d 368 (1950). Gee v. Pritchard, 2 Swans. 403, 36 Eng. Rep. 670 (1818) is the landmark case for this rule.

24. Comment, 11 WASH. & LEE L. REV. 74 (1954). A leading case indicating this trend is Orloff v. Los Angeles Turf Club, 30 Cal. 2d 110, 180 P.2d 321, 325 (1947), wherein the court stated: "The issue should not in logic or justice turn upon the sole proposition that a personal rather than a property right is involved. To so reason, is to place property rights in a more favorable position than personal rights, a doctrine wholly at odds with the fundamental principles of democracy."

25. *E.g.*, Caples v. Nazareth Church of Hopewell Ass'n, 245 Ala. 656, 18 So. 2d 383 (1944); Western Conference of Original Free Will Baptists v. Creech, 256 N.C. 128, 123 S.E.2d 619 (1962).

26. See Partin v. Tucker, *supra* note 21.

27. Hundley v. Collins, 131 Ala. 234, 32 So. 575 (1902); Stewart v. Jarriel, *supra* note 23. *Contra*, Rock Dell Norwegian Evangelical Lutheran Congregation v. Mommsen, *supra* note 18.

28. 53 Ohio Op. 288, 120 N.E.2d 485 (1954).

where the court rejected the prevailing view in giving relief to the plaintiff who had been expelled without notice and hearing in violation of the rules of the church. The opinion reasoned that "nowhere is any basis presented for the dogmatic conclusion that expulsion from a church does not involve civil or property rights."[29] The court found a property right existing in a possible division of the assests upon dissolution of the organization; a ground which one writer has concluded is too speculative and remote to serve as a sufficient basis for determining rights of these litigants.[30] Although bluntly in opposition to orthodoxy, this court's analysis seems deficient in that it does not approach the true nature of the problem, *i. e.*, that membership is a matter of human r e l a t i o n s and not property interests. It should be dealt with as such. Little is gained by straining old concepts to include things that simply do not fit. It appears the real significance of the opinion is that even though there is an unwillingness to abandon established principles, there is a tendency to broaden the concept of "civil rights."[31]

This trend is also evident in litigation involving expelled ministers and church officers who are receiving pecuniary benefits for their services. Most courts now find a protected civil right in a salaried office[32] or ministry,[33] although some of the older opinions maintain a strict point of view as to the pastor.[34] The attitude still prevails, however, that an unsalaried office is not within the meaning of the rule.[35] This position extends to instances where the church and the church corporation are distinct entities and the office held in the temporal corporation is dependent upon membership in the ecclesiastical body from which the plaintiff claims he has been wrongfully banished.[36]

While it can be observed that the majority view gives the church wide latitude in their internal affairs, some limitations are imposed upon the rule. The most important of these is the maxim, accepted by almost all courts, that the proceedings will be examined to determine whether the entity causing the expulsion had authority to act.[37] Thus, in the independent or congregational church where the majority, subject to no higher authority, makes the final determination,[38] consideration will be given to whether more than

29. *Id.* at 488.
30. Chaffee, *supra* note 8, at 999.
31. See generally Comment, 11 WASH. & LEE L. REV. 74 (1954).
32. Clapp v. Krug, 232 Ky. 303, 22 S.W.2d 1025 (1929).
33. Evans v. Criss, 39 Misc. 314, 240 N.Y.S.2d 517 (Sup. Ct. 1963).
34. See Travers v. Abbey, 104 Tenn. 665, 58 S.W. 247 (1900) (no property right where pastor was supported only by voluntary contributions); State *ex rel.* Hatfield v. Cummins, 171 Ind. 112, 85 N.E. 359 (1908).
35. Everett v. First Baptist Church, 6 N.J. Misc. 640, 142 Atl. 428 (1928) (deacon).
36. Hundley v. Collins, *supra* note 27. See Willis v. Davis, 323 S.W.2d 847 (1959), discussing the distinction between the ecclesiastical society having jurisdiction of the spiritual affairs, and the civil corporation having jurisdiction of the secular affairs.
37. *E.g.*, Caples v. Nazareth Church of Hopewell Ass'n, 245 Ala. 656, 18 So. 2d 383 (1944); Ragsdale v. Church of Christ, 244 Iowa 474, 55 N.W.2d 539 (1953); Trustees of Oak Grove Missionary Baptist Church v. Ward, 261 Ky. 42, 86 S.W.2d 1051 (1935).
38. *Supra* note 19.

half did act, and if not, the member will be reinstated.[39] Applying this rule, it was held in *Bouldin v. Alexander*[40] that fifteen members of an independent church could not expel forty-one others; a minority is without authority to expel a majority and such action is absolutely void. It has been held that the court will give conclusive weight to the church tribunal's decision as to its own jurisdiction to expel,[41] and the North Dakota Supreme Court, by way of dictum, has intimated that it will accept this position.[42]

As an additional limitation, courts under the majority rule will reinstate the plaintiff if fraud is involved. In *Hendryx v. People's United Church*,[43] the expelled members of the congregation sued to set aside a conveyance of church property to a third party. The defendant pastor had caused the sale as part of a fraudulent scheme to gain control of the property for his own benefit. All who opposed him, in the course of events leading up to the transaction, were summarily expelled. The court held the expulsions void because of fraud, stating that even though it would not decide ecclesiastical questions, it would reinstate the expelled members and entertain the action to prevent the defendants from wrongfully obtaining control of the property and diverting it to uses inconsistent with those existing when it was obtained. The court posed the question in this way:

> [C]an a man or set of men, or a majority of the church organization, by chicanery, deceit, and fraud, divert the property of a church organization to a purpose entirely foreign to the purposes of the organization, for their own selfish benefit, whether by the expulsion of members or in any other fraudulent manner?[44]

While this case, strictly speaking, was an expulsion case, it seems that the desired relief was granted on a basis analogous to that adopted in instances where a schism within the church is involved.[45] In these cases, it is generally accepted that although theological questions will not be decided, disputes as to the property will. Therefore, in instances where the congregation divides over any matter, ecclesiastical or otherwise, each claiming title to the property, the court will determine which faction adheres to the tenets and doctrine subscribed to when the church originated and award the property to that group in order to prevent a diversion to in-

39. *Supra* note 37.
40. 82 U.S. (15 Wall.) 131 (1872).
41. Kuns v. Robertson, 154 Ill. 394, 40 N.E. 343 (1895).
42. Bendewald v. Ley, 39 N.D. 272, 168 N.W. 693 (1918).
43. 42 Wash. 336, 84 Pac. 1123 (1906).
44. *Id.* at 1127.
45. A schism is defined in Lindstrom v. Tell, 131 Minn. 203, 154 N.W. 969, 971 (1915) as "a separation in a church occasioned usually by diversity of opinion on religious subjects. . . . Separation by reason of a schism is not like expulsion or excommunication. Those terms necessarily involve involuntary and compulsory separation of members, a schism arises from voluntary secession."

consistent uses.[46] The church's doctrine cannot be modified over objection of the minority, no matter how small. *Hendryx* seems to be the only case where the fraud argument has been used to void an expulsion, although a few courts have stated it is a ground for reinstatement.[47] This seems to indicate that the argument's application is limited to factional-like disputes to serve as a basis for preventing improper diversion. The prohibition, in the schism cases, against depriving objecting members of the use of the property by changing doctrines or customs also explains the rule that the church cannot change its original doctrine and make the acceptance of that alteration a condition of continued membership.[48]

Going beyond the property concepts, some courts have stated or inferred that the proceedings will be examined to determine whether the member was banished in bad faith.[49] This is undoubtedly inconsistent with the majority view, and, accordingly, the courts accepting the prevailing rule have rejected this as a basis for review.[50] Others, however, have decided to the contrary.[51]

THE MINORITY VIEW

Taking a more liberal approach, some courts hold that church expulsion proceedings will be reviewed to determine whether the proceedings complied with the rules and practices of the organization;[52] if not, the member will be reinstated. Some of these decisions have been based on the contractual theory that an excommunicated member, upon being admitted to the society, has agreed to the dismissal proceedings, provided those rules will be followed by the church.[53] A few courts have justified review on the finding of a property right existing in membership itself;[54] others discover such an interest in a share of the assets upon a future dissolution.[55]

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46. *E.g.*, Yanthis v. Kemp, 43 Ind. App. 203, 85 N.E. 976 (1908), *aff'd on rehearing* 43 Ind. App. 203, 86 N.E. 451 (1908) (use of property for immoral purposes); Maynard v. Headen, 334 S.W.2d 930 (Ky. 1960); Presbytery of Bismarck v. Allen, 74 N.D. 400, 22 N.W.2d 625 (1946) (dictum). See generally Note, *Judicial Intervention In Disputes Over Use of Church Property*, 75 HARV. L. REV. 1142 (1962). It has been pointed out that the rule may inhibit the natural development of church doctrine inasmuch as a strict application of the rule will make it possible for any member of the association to prevent even a slight modification of custom which is agreeable to the rest of the members. *Id.* at 1174. Apparently aware of this, some courts have noted the necessity of intellectual freedom and seem to take a more liberal approach to doctrinal change. See Partin v. Tucker, 126 Fla. 817, 172 So. 89 (1937).

47. First Free Will Baptist Church v. Franklin, 148 Fla. 277, 4 So. 2d 390 (1941); Murr v. Maxwell, 232 S.W.2d 219 (Mo. App. 1950).

48. Christian Church v. Carpenter, 108 Iowa 647, 79 N.W. 375 (1899); Trustees of East Norway Lake Norwegian Evangelical Lutheran Church v. Halvorson, 42 Minn. 503, 44 N.W. 663 (1890).

49. Erickson v. Gospel Foundation of California, 43 Cal. 2d 581, 275 P.2d 474 (1954); Dittemore v. Dickey, 249 Mass. 95, 144 N.E. 57 (1924).

50. Clapp v. Krug, 232 Ky. 303, 22 S.W.2d 1025 (1929).

51. Partin v. Tucker, *supra* note 46, seems to have overruled First Free Will Baptist Church v. Franklin, *supra* note 47 as to this point.

52. *E.g.*, Taylor v. Jackson, 273 Fed. 345 (D.C. Cir. 1921); Longmeyer v. Payne, 205 S.W.2d 263 (Mo. Ct. App. 1947); Kaminski v. Hoynak, 373 Pa. 194, 95 A.2d 548 (1953).

53. Blauert v. Schupmann, 241 Minn. 447, 63 N.W.2d 578 (1954).

54. Rock Dell Norwegian Evangelical Lutheran Congregation v. Mommsen, 174 Minn. 207, 219 N.W. 88 (1928).

55. Randolph v. First Baptist Church, 53 Ohio Op. 288, 120 N.E.2d 485 (1954); see Longmeyer v. Payne, *supra* note 52.

Both grounds seem rather remote. The adherence to the minority view in Massachusetts apparently stems from its unique history of government and church relations, specifically, the state supported church.[56]

An occasional jurisdiction will go beyond the requisite compliance with the church's own practices, and test the expulsion proceedings by their own concepts of fairness or common justice in cases where there are no established procedures, or where they are deemed inadequate.[57] This concept was established in Massachusetts in *Gray v. Christian Society*,[58] wherein the court held invalid a by-law providing for termination of membership for failure to contribute for one year or for dicontinuance of "regular" worship. Justice Holmes declared that these factual determinations could not be left to a single moderator, as provided, but because they were judicial questions, could only be decided by the society acting as a group after giving due notice and hearing.[59]

This imposition of the court's own notions of fairness has correctly received the criticism that while courts "may be confident that enforcement of the group's rules will not interfere with its functioning, they can in no way be certain that a judicially formulated rule will be tailored to fit the group's needs."[60] The question of the common justice standard quite clearly illustrates the bare bones of the majority and minority controversy. By an objective analyzation, the variance in these cases seems to descend from an irreconcilable and traditional clash in basic political theory: on the one hand, the contention of the Pluralist philosophy that the government, in order to bring about the greatest good, should allow private groups maximum freedom; and on the other, the view of the idealists that the most benefit to society as a whole can be assured by allowing the government to regulate all areas of activity, since the will of the state seeks only the common good.[61] It is the Pluralist concept that has prevailed in this country since its origin,

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56. See Taylor v. Edson, 58 Mass. (4 Cush.) 522, 525 (1849) wherein the court stated: "The law of this commonwealth regulating religious societies, and defining the privileges as well as liabilities of individual members of such associations, must be found in our peculiar local history and usages, in our constitution, and the various statutes enacted by the legislature, from time to time, rather than in any general principles contained in the elementary books relating to corporations generally."

57. Rock Dell Norwegian Evangelical Lutheran Congregation v. Mommsen, *supra* note 54; Powanda v. Pido, 304 Pa. 42, 155 Atl. 90 (1931). *Contra*, Bonacum v. Harrington, 65 Neb. 831, 91 N.W. 886 (1902).

58. 137 Mass. 329 (1884).

59. The *Gray* case was distinguished in Dittemore v. Dickey, 249 Mass. 95, 144 N.E. 57 (1924) wherein it was held that no notice and hearing need be given if the rules of the society so provide and if the removal depends on an executive or administrative decision, and not on the decision of a judicial or quasi-judicial question wherein definite facts must be ascertained. Although not necessary to the decision in that no authority for arbitrary expulsion existed, a broader rule—without the qualification as to judicial questions in *Dittemore*—is found in Moustakis v. Hellenic Orthodox Society, 261 Mass. 462, 159 N.E. 453 (1928).

60. Note, *Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 995 (1963).

61. See *id.* at 986-90 for a short and to the point discussion of these concepts. Chaffee, *supra* note 8 concludes with this observation. See generally, Losos, *Courts and the Churches In Missouri: A Survey of Missouri Law On Intra-Church Disputes With Reference To the Political Theory of the Pluralists*, 1956 WASH. U.L.Q. 67.

but the ascending complexity of our society has initiated some recent dissatisfaction with the ramifications of that attitude.[62] Although the expulsion cases do not refer to this dichotomy, it seems to be the most succinct explanation of them. The many reasons that have been used as bases for decision by the courts seem unsatisfactory; contract, property, separation of church and state, and many other concepts are simply inadequate. While it must be conceded that consideration of the Pluralist-idealist split alone will not provide a solution to the vexing problem of how the courts should deal with church discipline, it can serve as an excellent starting point for formulation of a correct standard.

The common fairness approach comes within the idealistic viewpoint and is followed by only a few courts. It also represents the greatest degree of interference with the churches' internal affairs, for it is accepted in jurisdictions following it, and in others, that the court will not look beyond matters of procedure to examine the merits of the case.[63] Whether grounds actually existed for the excommunication is a question exclusively for the church. As an additional limitation, no relief is granted in the minority states until all available remedies within the organization are exhausted.[64] This rule will usually be inapplicable since most of these cases arise in the independent church where there is ordinarily no higher tribunal, to which an appeal can be taken, than the majority.

CONCLUSION

> Excommunication from a church means loss of the opportunity to worship God in familiar surroundings with a cherished ritual, and inflicts upon the devout believer loneliness of spirit and perhaps the dread of eternal damnation.[65]

Certainly the exiled member's predicament must often appeal to a court's sympathy. The feeling of natural justice is grated by the arbitrary severance of so serious an attachment, at least where the plaintiff is a devout believer who has been wronged by an impetuous congregation acting on insufficient grounds. Perhaps it is true that a good many of these cases do not contain such obvious injustice—maybe the plaintiff rightfully deserves his damnation. But even so, there are other important factors to be considered in resolving the issue.

When the court orders the church to reinstate the member, it is regulating its internal affairs. That, prima facie, is undesirable from the Pluralist point of view, and in the absence of an interest which

62. Note, *supra* note 60 at 987.
63. Canadian Religious Ass'n v. Parmenter, 180 Mass. 415, 62 N.E. 740 (1902).
64. Knauss v. Seventh-Day Adventist Ass'n, 117 Colo. 540, 190 P.2d 590 (1948); State v. Ellis, 140 So. 2d 194 (La. 1962); *accord*, Bendewald v. Ley, 39 N.D. 272, 168 N.W. 693 (1918).
65. Chaffee, *supra* note 8, at 998.

will be affected by excommunication, and which is of the type traditionally held legally cognizable, abstention is dictated to the courts of conservative tendencies. From the idealistic standpoint the judiciary's hand is not stayed on the basis of these factors. But when the judge who leans toward this concept arrives at this point, he must consider other elements and balance them against the plaintiff's deprivation.

Even if the court steps in, can it give satisfactory relief to the plaintiff? Will he simply be expelled again,[66] this time in accordance with the proper procedure, and if not, will he desire to continue the relationship if it lacks the warmth of good fellowship, an element as basic a reason as any other for joining or staying in a church? Perhaps this is too pessimistic a view of church personality, but it seems important that a court examine these things and concern itself with its own capabilities and the disruptive effect judicial interference may have on the group. Moreover, church litigation should not be encouraged. While adoption of the minority view may cause a church to make certain its procedures are followed in order to prevent a lawsuit with the people it expels, it is conceivable that even this action will not always lessen the likelihood of the congregation defending itself in court. In many churches there may be honest dispute as to what procedure is required for putting out a member, and so the group may be forced to accept the presence of the plaintiff even if there has been a good faith effort to deal with him as fairly as is required.[67]

The majority appears to be the better view. But no matter which position is accepted by the courts, their decisions in these cases should be based on a consideration of all the factors involved, rather than on stare decisis alone.

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66. This is what happened in Longmeyer v. Payne, 205 S.W.2d 263 (Mo. Ct. App. 1947). After the expelled plaintiff was reinstated by the court, the church took great pains to ascertain what its rules of expulsion were and finally succeeded in ridding itself of the plaintiff the second time around.

67. See Evans v. Criss, 39 Misc. 2d 314, 240 N.Y.S.2d 517 (Sup. Ct. 1963). The church voted by a majority of one hundred twenty to two to expel the plaintiff minister after giving notice and hearing, but the court ordered him reinstated after determining from all the evidence that it was a church custom to discuss the matter at two meetings before voting on it.